IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MILDRED E. JOHNSON,

Plaintiff,

-vs-

W. R. GRACE AND COMPANY,

Defendant.

Civil Docket
No. 88-145-M-HP

COPY

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

Heard in the Courtroom
United States Courthouse
Missoula, Montana
August 23, 1990

BEFORE THE HONORABLE HARRY PREGERSON

UNITED STATES NINTH CIRCUIT COURT JUDGE

TINA C. BRILZ, RPR
Official Court Reporter
United States District Court
301 South Park - Drawer 10122
Helena, Montana 59626

A P P E A R A N C E S :

PRESENT ON BEHALF OF THE PLAINTIFF, MILDRED E. JOHNSON:

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The following proceedings were had:

(A jury was duly impaneled and sworn.)

(The following proceedings were had in open court, with the jury present, beginning at 10:49 a.m.:)

THE COURT: Please be seated. See I have a lap computer here, and our courts are all tied in with electronic mail and cover all the western states, so I'm trying to rig it up here, and we're having problems getting through and programming it, so my law clerk is working with someone from San Francisco who's walking him through all the steps. Once we get it hooked up, then we'll not only be able to pick up all the mail electronically, but then we have access to a vast library of books and resources all through the computer system. It's an amazing gadget when it works.

Now, I'm just going to briefly give you an outline of how this case is going to proceed. We're going to start by the Plaintiff through her attorney making an opening statement. And then the Defendant may make an opening statement or may reserve making an opening statement until the Plaintiff puts on its case, probably the Defendant will make an opening statement at this time.

Now, opening statements are not evidence, they're just an aid to understanding the significance of the evidence when it comes in. They're really an overview or a road map. The evidence comes in piecemeal. The opening statement will kind of arch over all of that, and give you an overview of what the case is about from the Plaintiff's side and from the Defendant's side, so that when the evidence comes in, you'll be able to fit some of the pieces together.

And after the opening statements are made, the Plaintiff will introduce evidence. When the Plaintiff is through introducing her evidence, then, of course, the Defendants will put on their evidence and there may be some rebuttal, and then the Court will instruct you on the law and you'll hear argument of counsel and the case will be submitted to you for deliberation and for your decision.

All right. Is counsel ready to proceed? Mr. --

MR. BAIZ: Yes, Your Honor.

THE COURT: You're going to make the opening statement, Mr. Baiz?

MR. BAIZ: Yes, I am, Your Honor.

THE COURT: Very well.

MR. BAIZ: May it please the Court, members of the jury. My name is Tom Baiz. Seated at counsel table is Millie Johnson. She's the Plaintiff in this action. Seated next to her is Tom Lewis. You'll also hear from Don Johnson who is Millie's husband sitting in the first row back there, and you'll see Debbie Enruth a lot during this trial. She is a legal assistant, and she'll be working with us during this trial.

If you look at a trial as a puzzle, the opening statement is an opportunity for me to show you what the puzzle will look like once the pieces of evidence and testimony have been put together. The testimony and evidence in this case will lead you down W. R. Grace's asbestos dust trail starting on the east coast and spreading to Libby, Montana, where W. R. Grace and its predecessor, Zonolite, have operated a vermiculite mine and mill for many years.

The vermiculite ore which is mined at Libby is and has always been contaminated with an asbestos fiber known as tremolite. Exposure to tremolite asbestos at that facility in Libby has meant death and disease to many workers and to their families. And it's that same exposure to W. R. Grace's tremolite asbestos which has caused Millie Johnson to develop asbestosis.

Asbestosis is a disease caused by exposure to asbestos. And it's a lung disease which is very slow to develop, sometimes taking 20 to 40 years after first exposure for an individual to start showing symptoms of the disease. But it's a disease that literally squeezes the air from an individual's lungs.

The testimony and evidence in this case will show that Millie Johnson is a totally innocent victim of W. R. Grace's tremolite asbestos and an innocent victim as well of W. R. Grace's utter disregard for her health and welfare and the health and welfare of its workers and their family members.

Millie Johnson is 53 years of age and a lifelong resident of Libby, Montana. During her early childhood, her father even worked at the vermiculite mine and mill there. He worked there for about five or six years. And Millie went to school at Libby, graduated from high school at Libby. Shortly thereafter she married Don Johnson in 1955, and they've raised their four boys in Libby.

From the date of their marriage until 1981, or what is 26 years, Don Johnson was exposed to great amounts of tremolite asbestos every workday throughout the 26 years. And you will hear from him about that. No one at W. R. Grace ever informed Don Johnson of the dangers of asbestos or hazards of asbestos, even though they knew them. So for 26 years, Don Johnson had no idea what he was doing to his lungs.

In the early 1980s, Don was diagnosed as having asbestosis. And he's been followed by Dr. Allen Whitehouse, a pulmonoloigst in Spokane from whom you'll hear in this case. And Dr. Whitehouse advised Don in 1981 that he was totally disabled from his asbestosis. So Don, at the age of 48, became totally disabled and hasn't worked a day since then. His asbestosis is now severe and drastically restricting his lung capacity and many of the activities that he could perform as a result.

The importance of establishing Don Johnson's disease and the nature of and extent of his disease is because it is from Don Johnson, more particularly from his clothing that Millie Johnson contracted her asbestosis. Don Johnson would bring the asbestos dust home on his clothes on a regular basis for 26 years. He worked in a place called the wet mill, and in the wet mill the asbestos dust would stick to his clothes and then it would cake on his clothes. And so on a regular basis he'd take this clothing home, and it would be caked with asbestos dust. Millie Johnson would take the clothes, she'd pull open the pockets and there'd always be a considerable amount of dust in the pockets. She'd shake out the clothes vigorously to get as much of the dust off as he she could, and she'd put it in the washing machine always washing it separately from the family's clothing. She'd have to clean out the washing machine after washing them. She'd sometimes rewash, she'd sometimes wash three and four times to try and get the dust out of the clothes.

And that is the primary place where she got her exposure. Also through the family vehicle, which Don would drive to a parking lot and then he would take a bus up to the facility and take a bus back. And, of course, he'd get in and out of that, and Millie would ride in the car. And she was the one to clean out the car, and some she got exposure that way too.

But even after Don was diagnosed as having asbestosis in the early '80s, Millie never dreamed that she was at any risk whatsoever. Nobody at W. R. Grace ever told her anything. She had no idea. So it was that Millie began to notice shortness of breath. And she decided to go with Don to Spokane to see Dr. Whitehouse when Don went for his regular exam in 1988.

At that time, Dr. Whitehouse performed the examination, and in taking a routine chest x-ray, he found extensive pleural disease. Now, you'll hear about the pleura and pleural plaques. But the pleura is the area that -- it's the covering of the lung and the covering of the chest wall. And it's the area in between those two. It's a very small area. And what happens is when the asbestos dust is inhaled, it either goes through the lymph system and gets into the pleura or goes through the lungs and travels through lung tissue itself and gets into the pleura. And then it lodges in the pleura and forms what is called pleural plaques. And you'll hear that term used.

Sometimes they -- pleura plaques are called the calling cards of asbestos.

But in any event, he found that and he also did a lung function test or what's called pulmonary functioning test, P-F-Ts. This is where Millie would blow into a tube and various figures would registered, registering as to her vital capacity in her lungs, her total lung capacity, and that sort of thing. It was in 1988 that Dr. Whitehouse found that Millie's forced vital capacity was only 83 percent of what was -- of the predicted normal for a woman Millie's age, and her total lung capacity was only 87 percent. And this must be considered in the context of a woman who's kept herself in good shape all her life and has been a lifetime non-smoker. So those figures should have been much higher, like around a hundred percent anyway.

So Millie went back for a followup in 1989. At that time, Dr. Whitehouse determined that she had lost 200 cubic centimeters off of her forced vital capacity and off of her total lung capacity, and you'll hear Dr. Whitehouse explain forced vital capacity, total lung capacity, and the significance of those figures. In March of this year, she went back for her annual followup examination, and her forced vital capacity had dropped to 80 percent of the predicted normal, her total lung capacity to 83 percent of predicted normal for a woman her age. And her diffusion capacity to 75 percent.

Now diffusion is the ability of the lung tissue to transfer the gases, to transfer -- to make a carbon monoxide and oxygen transfer across the lung tissue. And that was reduced to 75 percent. And you'll hear Dr. Whitehouse testify about how that restriction is directly attributable to asbestos and her asbestos exposure.

As time has gone on, Millie has become more short of breath with no way of predicting the future. At the present time, she is still working at U-P-S 15 to 20 hours per week. But she's finding it increasingly difficult to perform the job tasks, and she fears that her asbestosis may cut her career short there. And we'll present some testimony as to the compensatory damages attached to that during this trial.

Millie's also concerned about her cancer risk. The fact that she's been exposed to asbestos places her at greater risk for developing a deadly cancer known a malignant mesothelioma. It's a cancer that attacks the lining of lungs and lining of the chest wall, the pleura, right where Millie has the plaques right now. And asbestos is one of the few substances known to cause malignant mesothelioma. And the fact that she has the plaques in addition to asbestos exposure, makes it even more likely that they could cause malignant mesothelioma. And she has a fear of that.

She also has a fear of suffocation. With weather changes, and if there's pollution in the air like there is in Missoula sometimes, she'll have a difficult time and she'll, you know, be gasping for breath and feel a real tightness in her chest.

You'll hear from Millie and Don Johnson about how asbestosis has affected them, and you'll hear from their treating physician, Dr. Allen Whitehouse. Dr. Whitehouse is in Spokane, and he's a pulmonologist in Spokane. A pulmonologist is a specialist in pulmonary diseases, lung diseases, including asbestosis and asbestos-related diseases. He'll talk about his experience with asbestos-caused lung disease. His experience in general and more importantly his experience with people from Libby in particular, and the people from Libby are those who are exposed through the W. R. Grace facility there, the mine and mill.

He'll discuss the types of lung diseases that are caused by exposure to asbestos. Asbestosis, of course, is the non-malignant type, and he'll talk about that, and he'll talk about how the lungs are affected and how the individual is affected symptomatically. He'll tell you that asbestosis is not curable, and it's not treatable except maybe symptomatically. If somebody were to get a cough or something like that, they could maybe treat the cough, but there's no cure and there's no real treatment for it.

And as I indicated before, he'll also talk about the mesothelioma risk. He'll tell you, too, that because he had so many patients from Libby who worked at the mine and mill, that he wanted to go there. And one day he got an invitation from W. R. Grace to tour the facility and he was very interested, and he accepted it. But for some reason, it was withdrawn, the invitation was withdrawn at the last minute, so he's never been able to visit the facility there.

Finally, Dr. Whitehouse will tell you about Millie's asbestosis and what he thinks about her future, and he'll also discuss Don Johnson's asbestosis, because he's followed him for nine years. And as I indicated before, that's where Millie got her disease.

You will hear, too; in fact, you'll see a video presentation from the Defendant's medical consultant in this case, a man by the name of Nicholas Sargent. Now, Dr. Sargent has no real relationship to this case whatsoever, except that he was hired by W. R. Grace's lawyer at the rate of $500 per hour to offer testimony at this trial. We took his deposition at his office in Los Angeles less than a month ago. He'll testify that he's a radiologist, not a pulmonologist. In other words, a radiologist is someone who just interprets chest x-rays, and his opinion is based almost exclusively on interpretation of chest x-rays. He'll talk about the criteria for diagnosing asbestosis, which includes a history from the patient; it includes chest x-rays, it includes pulmonary function testing, a finding of shortness of breath, and physiological abnormalities. And he will admit that he's only trained to do one of those things, and that is interpret the chest x-ray. And he will tell you that you must look to the treating doctors, in this case, Dr. Whitehouse for any indication as to functional impairment or disability, because he can't offer that as a radiologist.

He'll tell you that he's been a consultant in the past for various asbestos manufactures including Johns-Manville; that in four out of five cases in which he's consulted, he testifies on behalf of asbestos companies; and he's been asked by W. R. Grace to consult in 10 or 15 other asbestos injury lawsuits arising out of the W. R. Grace facility at Libby.

He was not asked to consult by Dr. Whitehouse in this case. He's never been involved in any treatment of Millie Johnson. He's never examined Millie Johnson. He's never even seen Millie Johnson. He knows nothing about the W. R. Grace facility. But despite Dr. Sargent's demonstrated bias in favor of asbestos manufacturers, here is what he states which is of relevance in this case: That asbestos is a dangerous substance; that the health risk of asbestos exposure has been known in England since the early 1900s and in the world community for many, many years; that tremolite asbestos such as found in Libby is amphibole form of asbestos which is the type most commonly found in lung tissue of workers. He's seen asbestos caused lung disease in people who simply live in the same house with an asbestos worker. He admits that Millie Johnson has pleural disease from asbestos exposure. And he characterizes Millie Johnson's pleural disease as moderately severe. He admits that asbestos exposure increases the risk of getting the deadly cancer known as malignant mesothelioma; and future progress of Millie's disease is unknown. He states that only Millie Johnson's treating doctor, in other words, Dr. Whitehouse, can make any determination as to her disability or her impairment.

Then we get into the other aspect of this case, which is W. R. Grace's knowledge of the hazards of asbestos in general and their knowledge of the hazards at their Libby mine and mill in particular. You'll hear excerpts from depositions of, hopefully, J. Peter Grace himself, the chairman of the board, who set up his worldwide corporation so as to know as little as possible about his operations, such as the Libby mine and mill.

You'll hear the deposition testimony of a man named Rodney Vining who was in charge of the entire construction products division of W. R. Grace, and that was the subdivision which was in charge of the mine and mill operation in Libby. And you'll hear from him. And it's amazing that despite having visited the Libby operation 25 to 50 times, receiving documents about it over the years, and authorizing documents, he remembers very little.

You'll also hear from Earl Lovick who is seated here today. He started working for W. R. Grace's predecessor, Zonolite Company in Libby as an accountant in 1948, became assistant manager in '62, and worked in that capacity until 1968, at which time he became general manager of the Libby mine and mill. He was W. R. Grace's corporate connection at Libby. He saw much of the flow of documents which you'll see that went between W. R. Grace officials and which related to the Libby mine and mill.

Finally, you'll be able to see the trail of documents establishing W. R. Grace's knowledge of the hazards of asbestos. This starts with the knowledge of the hazards of asbestos at their corporate headquarters on the east coast many years before W. R. Grace took over the Zonolite operation at Libby, Montana. You'll be able to see Montana State Board of Health documents from inspections which they did at the Libby facility starting in the mid 1950s. You'll be able to look at an x-ray study which was performed on workers back in 1959 and which showed 48 out of a hundred and thirty employees that were checked had abnormal chest x-rays. In 1963 and 1964 the Montana State Board of Health performed followup inspections at Libby. The dust counts taken in those followups, this is after W. R. Grace took over in '63, all exceed the 5 million paricles per cubic foot allowable concentration. And what you have to understand is that's a concentration that has been drastically reduced over the years. Now the allowable concentration is like point two fibers per cubic centimeter. Back then the allowable concentration was 5 million particless per cubic foot of air. Yet all of the figures registered were well over that. In fact in the 1963 counts the dust counts ranged from 10.7 million particles per cubic foot to 10.2 million particles per cubic foot. Also these reports pointed out a serious dust concentration at Libby.

And in those reports -- you'll be able to look at them-- it will show the connection between asbestos exposure and cancers such as malignant mesothelioma which I've already mentioned.

None of this information was made available to Don or Millie Johnson, even though they had it and had had it for years. You'll be able to look at an x-ray and spirometry study. Now, spirometry is basically the pulmonary function test which I referred to earlier and which you will hear about. A spirometry study was done in 1964 showing serious hazard for its employees, and Don Johnson was even a part of that in one or more of the documents. You'll even see his name listed as to the x-ray results.

Also in 1964, W. R. Grace knew that a worker of seven years, only seven years was diagnosed as having asbestos caused lung disease. In January of 1965, the man who was in charge of the Libby operation at the time, a Mr. Blake, was reviewing a decade of reports on the Libby mine and mill, and he stated this: I quote, "I can only say that it represents a very sorry record."

Also, in 1965, there were abnormal chest x-rays in 18 out of 39 employees at Libby who had ten or more years of employment there. By 1968 or 1966, excuse me, W. R. Grace had knowledge of the link between asbestos exposure and cancer. And in fact, they had knowledge that the exposure didn't need to be continuous for the link to be shown. A 1967 American Journal of Medicine article reported that simply living in the same house as an asbestos worker could produce serious lung disease.

This certainly would have been important for Millie Johnson to know, but she was never told. Also in 1967, there was a hearing before the Montana State Industrial Accident Board. And this hearing was concerning a W. R. Grace worker at Libby who had asbestosis from his work at the mine and mill there. A W. R. Grace lawyer from the east coast who was reporting to other Grace officials on this hearing stated, and I quote: "A record has now been made that there is a danger of asbestosis in our operation."

In 1968, W. R. Grace knew that relatives of asbestos workers were at risk for lung disease, and this included women who had washed their husband's work clothes regularly.

Despite knowing this, there was still no warning, no mention to Millie Johnson. In 1969, W. R. Grace officials were still pondering just how much they should tell their employees that their own lung conditions.

In 1969, also, a document entitled "The Vermiculite Ore Review" appears to have crossed the desk of J. Peter Grace himself, the chairman of the board of W. R. Grace; and it indicated that tremolite asbestos at Libby was a definite health hazard.

Microscopic tests which were done revealed that the Libby tremolite asbestos had a five to ten times greater chance of causing a cancer than a more common type of asbestos fiber known as crysotile.

In the latter 1960s, the Public Health Service was interested in studying populations that were exposed to asbestos disease. W. R. Grace refused to cooperate. In June of 1968, the Public Health Service sought the names of former employees at the Libby mine and mill so they could do some research on asbestos disease. W. R. Grace superiors refused to give permission to release the names and they stated, "We should not give any listings of employees unless there is a legal requirement to do so."

When permission was sought again to release the names, the Grace superiors stated that they'd run it through Cambridge, which is their headquarters again, and the answer is still the same, "We do not choose to divulge the information."

Members of the jury, at the close of this case, we're confident that Judge Pregerson will present to you questions as to the compensatory damages that may be awardable to Millie Johnson to compensate her for her losses, past, present, and future. And also a question as to punitive damages which are used to punish W. R. Grace for their conduct.

The testimony and evidence that we present in this case will be presented in support of our two theories as the judge has already indicated to you. The first is strict liability. And with our strict liability theory, we are -- our position is that W. R. Grace is liable for allowing an abnormally dangerous substance, namely asbestos, to escape its mine and mill operation and to damage Millie Johnson's lungs.

Our other theory of liability is negligence. And here we'll show that W. R. Grace knew of the health hazards of asbestos and the health hazards of its own operation at Libby, but despite knowing that, that they failed to warn Millie Johnson of the dangers. They had a duty to warn, but they failed to warn. They had a duty to take precautions to protect Millie Johnson and others in her position, but they failed to take those precautions. They didn't -- They didn't provide washers and dryers up on the hill. Showers were only there for a very short period of time and got so clogged with asbestos that they used it as a storage room, and they didn't have adequate facilities to protect. They just simply didn't take adequate measures to keep their asbestos dust on their own premises, even though they knew how dangerous it was.

Then at the conclusion of the case, it will be in your hands. And as my dad always used to tell me, you need to keep your eye on the ball. We don't have any ball here, but the ball is the truth, ladies and gentlemen. And don't be diverted from the truth in this case, the truth about W. R. Grace's conduct and the truth about asbestosis and what it has done and will do to Don and Millie Johnson. Because the truth was the same yesterday as it is today and as it will be tomorrow. I'm confident that you'll find the truth in this case and that you will do justice through your verdict.

Thank you.

THE COURT: Thank you, Mr. Baiz. Mr. Graham, do you wish to make an opening statement?

MR. GRAHAM: Yes, sir, Your Honor. We would at this time.

THE COURT: Vey well.

MR. GRAHAM: May it please the Court, lady and gentlemen of the jury. It's always difficult going second, because you have to many things that you want to say in reaction to the things that were said initially. But I suppose it's better going second than going first and not being able to respond to the comments that are being made.

Obviously, in this case, the evidence will be presented after these arguments -- after these opening statements, and then there will be a lot of argument about what the evidence means. So you'll get a lot more of lawyer talk after the evidence comes in.

What I would like to do, and it may take -- it may take a few minutes, and I would appreciate your patience during the few minutes that it takes me, what I would like to do would be to provide you with a little bit of a historical background with respect to the Libby operation so that you can understand the evidence as it comes in throughout the case, and so that you can get a better picture of precisely what aspects of knowledge were known to various groups of people at various times. That's undoubtedly going to be very significant as you listen to the evidence.

The events in this case span about 40 years. Go back to the '50s. And each of you could look back in your life, and 40 years is a lot of time and a lot of documents and a lot of things that have happened. But in any event, as I go through this 40 years, I'll try to capsulize it, and like I say, I hope that it will help you as you're listening to the evidence understand how everything came together.

First of all, I'd like to remark as to the relationship between the parties. Because as you know, we have Mrs. Johnson as the Plaintiff in this case and W. R. Grace, who's represented here today by Mr. Lovick, as the Defendant in this case. Mr. Lovick is here because of the fact that of all of the people who were involved with W. R. Grace and its predecessor Zonolite in Libby, Earl is probably the one that knows more about what happened up there.

In any event, there is no direct relationship between these parties. Mrs. Johnson, as you know, did not work at the mine and mill in Libby. She visited on a few occasions with guests but didn't work there. Her husband worked there as has been described. The claim as has been told to you is that he brought his clothing home and it had some asbestos dust on the clothing. The claim is that that led to the asbestos related disease that has been diagnosed in Mrs. Johnson.

The evidence will be primarily from the testimony of Mr. Lovick that W. R. Grace nor Zonolite before it had any idea that any of the asbestos that they knew to be a natural contaminant at the Libby mine and mill would find its way into homes and affect the people, the housewives and other people living in the homes.

It will be the evidence on the part of the Defendant, W. R. Grace, that there was no knowledge by Grace that Mrs. Johnson would be harmed. There was no medical basis at that time for making that prediction, and it was not reasonably foreseeable based on Grace's knowledge.

Now, what was the purpose of the mine and mill at Libby? The purpose of the mine and mill was to mine and process -- put into concentrate form a substance known as vermiculite. It was discovered there in the 1900s. The mill and mine are about 12 miles out of Libby, and I always get confused out of Libby because what I think is east and west is usually north and south. But it's 12 miles out towards the Libby dam.

Vermiculite is a very versatile product. It expands and has been used as insulation. A lot of people have known it to be a substance called Zonolite. And it -- It's strange because when it's mined, it's mined in little flat flake sorts of things, or substance. And then to change it into the substance that is marketed ultimately, it's put into a high heat process and the moisture in the vermiculite causes it to expand and it forms a very light-weight insulating type of substance. Sometimes it's referred to as worms, because it looks sort of like a worm that has gone from a flat little piece of vermiculite.

We'll show you photographs of that, the two different substances, the vermiculite before it's expanded and vermiculite after it's expanded, so you can see what it looks like.

As I say, it's used in a number of ways. Insulation is one. Gardens, texturing, various and sundry things.

Now, this mine and mill were established by Zonolite. And it's an open mining, open operation. The ore was taken from this sort of open hilltop and transferred to a transfer point with trucks and then went through a milling process. And basically, the milling process consisted of taking the waste rock from this vermiculite so that when the -- when the process came out of the mill or when the product came out of the mill, it was essentially vermiculite. This is the process that ended up creating the dust problem that they had at Libby right in the inception, particularly in the dry mill, because what they would do is they would use shakers and screeners, something like, I suppose, you could imagine an old-fashioned threshing machine or a combine shaking things and causing the flake material to precipitate out and then go off and be processed.

As I say, in this rock was a natural product called tremolite, and it is as Mr. Baiz indicated, a form of asbestos. That was part of what they were trying to take out of this product before they marketed it. And that was part of this whole manufacturing process. The Libby mill was unique in that regard, because that's, as I understand it, the one location where there was this tremolite in the vermiculite deposits that they were working with.

Anyway, it didn't involve situations where asbestos was produced or utilized for purposes of commercial marketing. In fact, they didn't want to have the asbestos in the product. After the stuff was concentrated, after the vermiculite was concentrated, then typically it would be sent off to be expanded in other areas.

Now, as I indicated, it was the -- the operation was originally owned by Zonolite Company, and it was a smaller company with headquarters in Chicago, as I recall. They owned the mine, the mill, and some expanding plants, other expanding plants operated under license.

W. R. Grace first became involved in this thing in 1963, and this would have been some 10 to 15 years -- 10 to 12 years after Don Johnson started working up at the Libby mine and mill. W. R. Grace has operated it since that time.

There was a problem with dust at the Libby mine and mill and the facility from the beginning. As I indicated, it was the dry mill where these rocks and debris were taken from the vermiculite that was the dustiest of the locations. As Mr. Baiz indicated, the Board of Health made a number of visits. And they originally came up, I think in about 1940 sometime, but the first report that is probably significant and will be shown to you is the report in 1956.

What they did is they tested for the particulates in the air something like they do here in Missoula during the wintertime, I guess. Over the years, the concept and ideas of the amount of dust exposure changed as you've seen it change in other situations. Originally it was spoken of as the maximum allowable concentration. And it presumably at that point was the line between what was safe and what could be considered to be unsafe. It wasn't a precise dividing line as the reports that you will read show.

In the '40s and '50s, there was a safe level of 50 million parts per cubic foot of dust. In 1956, another standard came into play, and that was 5 parts per million -- or five million parts per cubic foot, but that was a hundred percent asbestos dust. And the problem was that no one knew how much tremolite dust was contained in all of this dust that they were getting. There weren't accurate ways to measure that at that time.

The Board of Health estimated it at 8 percent, and at some times some of the locations exceeded that, and W. R. Grace or at that time it was Zonolite, but that's something that's shown in the reports, and it's admitted to be the case.

Over the years, the Board of Health continued their inspections, and when W. R. Grace -- and that information will be provided to you. When W. R. Grace took over, they attempted to accelerate the cleanup process, and over the years before W. R. Grace had taken over, there were some attempts made to try to clean up the dust. They had fans and tried to cover up the areas that were creating the dust and all of that. But at the time that W. R. Grace took over, there wasn't any indication that it was an emergency situation. And so they -- That was not indicated by what they heard of the conditions. So they proceeded to try to continue to clean it up at a reasonable rate.

As time went on, as I indicated, the standards that the Board of Health were applying became more stringent as you frequently see with Board of Health types of things as more is discovered. They went to a 20 million part per cubic foot figure, then down a 10 million part per cubic foot figure, then to a totally different measurement called fiber count.

At any rate, the old mill could only be cleaned up so much. And ultimately when the technology became available and as soon as the technology became available, W. R. Grace eliminated the old dry mill and a wet mill which was operating at that time, as Mr. Baiz indicated, that's where Don Johnson worked, they eliminated those two and put a totally new mill in which satisfied all of the federal and state requirements with respect to dust exposure.

The engineering of that mill started in 1969. And it was a difficult process to get it engineered, because it was something entirely new, and the testimony will be that it was very difficult to get it up and running and processing the ore.

From that point on, the dust levels at the vermiculite mine and mill were believed to be safe. It involved this whole process of improvement, first from the 1963 period until 1974, and then the construction of the new mill involved considerable expenditures of funds establishing a commitment by W. R. Grace to the safety of its workers.

Now, Mr. Baiz has described briefly for you the concept of asbestos exposure and what health effects there are related to asbestos. As we now know, asbestos is a dangerous substance. Different forms of asbestos seem to be more dangerous than other forms. Usually, however, when we hear of asbestos being dangerous, we hear of it in terms of insulations or fire protection, or we remember it being used on furnaces or boilers. We thought it was then a miracle fiber because it was perhaps the best insulator or fire protective device that existed.

But at Libby, the tremolite, which is a form of asbestos, is a natural product. It comes right out of the ground. You can pick up pieces of it. We'll have photographs to show you of the asbestos as it just comes out of the ground. But as we know now, it can cause problems in susceptible people. For instance, Mr. Baiz spoke of lung cancer where there are high exposures to asbestos. That's not one of the matters that need concern you in this case.

A person who's sufficiently also exposed can also get asbestosis. Mr. Johnson is an example of a person with asbestosis. In that disease, the asbestos affects the lungs by scarring the lungs. Sometimes called interstitial fibrosis. You'll probably get a lot of these terms thrown at you throughout the period of this trial, but they'll be explained by the doctors or by whoever's testifying.

Then there's another disease process which is related to asbestos which is involved in this particular case, and that's pleural disease. Pleural plaques. And the best way to describe that is by just illustrating where it is that the pleura is and where the plaques form. And if you take my two fists and say that my left arm is the lung and my right arm is the chest wall, the space in between is called the pleural space. My left hand, or the lung, would be covered by a layer, a very thin layer of tissue called the visceral pleura. The chest wall part of my hand would be covered by a very thin layer called the parietal pleura. And with pleural disease, there are plaques that form on the inside of the parietal pleura. Those are typically asymptomatic, and as Mr. Baiz said, are referred to frequently as just a calling card of asbestos exposure.

So if you have had -- If you have pleural plaques, essentially what it means is that you've been exposed to asbestos. They typically only show up on x-rays or C-T scans, and as I say, it only shows that the person was exposed. And that's what we have involved in this particular case.

There is one similarity between all of these, and that is the latency period from the time of exposure until the time of the -- the disease becomes apparent. And Mr. Baiz spoke of that as well. We're talking in terms of 15 to 30 years between the time of the exposure and the development of the disease to the point that you can see it. So when you look at what's happening today as far as health picture is concerned, you have to look back 15 to 30 years before to find out what the situation was like as far as the exposure and as far as the knowledge concerning asbestos at that time.

Now, as I indicated, W. R. Grace or Zonolite before W. R. Grace, was aware of the dusty conditions and they provided respirators, breathing devices in the dustier parts of the mine and mill, made them mandatory in the dry mill which was the dust creator up there. You'll be shown Board of Health reports by the Plaintiff in this action, and you'll note that most of them relate to inspections only of the dry mill, because that was the area that they were concerned with. They knew that the dust was not healthful to the workers, but they didn't know about tremolite. There was very little written about tremolite.

The testimony will be that the stuff that was written related to the other forms of asbestos that are more common. Tremolite is fairly rare as far as occupational exposure.

Now, in 1959, W. R. Grace took x-rays of all their employees. And it was a system -- They used a system that was designed in cooperation with the doctors in Libby. And the idea was that all of the employees would be -- would be x-rayed to determine whether they had lung problems. Now, the doctors agreed that this procedure would be the best. They provided the results to the family physician of each one of the employees, so that the person who ended up with the x-ray report was the doctor that was normally in charge of treating that particular individual. The idea was that the doctors would then tell the employees about the results of the x-ray.

Mr. Lovick will testify that the reason that that was done was so that qualified medical people would be able to talk to the individuals who were the workers up there about any conditions that they may have, rather than have the information provided by non-medical personnel.

Now, the workers were told when their x-ray reports were available and so they were supposed to go in and see their doctor when the x-ray reports were available. The x-rays, as Mr. Baiz indicated, did in fact show a number of abnormal chests, but they were abnormal for all different kinds of reasons. And when we go into that particular area, we'll discuss it in more detail in the testimony.

In 1964, there was a program set up so that there were x-rays every year. And the individuals were told to talk to their doctor about the x-ray reports every year so the health of the employees was monitored on a yearly basis.

You've heard that pulmonary function tests were taken in 1964, and then starting in the '70s, they were taken every year and the employees were told of all of the pulmonary function test results. In 1964 when they took those pulmonary function tests, which are breathing tests, they attempted to correlate them with the x-rays. They were sent off and nothing of a conclusive nature was found with regard to the examination of those pulmonary function tests.

Similarly, a study was -- Or the doctors consulted -- Libby doctors consulted with regard to the x-rays up there in 1959 and didn't find any conclusions that could be drawn from the x-rays as to whether Libby presented a danger or didn't present a danger to the health of the workers. And that was done with the doctors.

So as time went on, in the mid '60s, there was some indication of the first asbestosis case. The first asbestosis hearing as has been discussed previously was in 1967. And at that point, W. R. Grace recognized that some of the people who were the employees up there might be getting diseased. At that very same point, W. R. Grace undertook with a sense of urgency, the improvement of the conditions at the mine and mill. And very shortly thereafter is when the technology finally became available to replace the whole thing. And as I indicated, at substantial cost, they replaced the whole mill.

So over the years the dust levels had been lowered by various improvements. There will be the testimony about each one of those steps. The standards had been lowered by the Health Department as always. And the plant was redesigned. And that was 17 years ago that that was done. A long time ago.

Over the years, studies had been suggested, and Mr. Baiz had pointed out, for example, we'll take the H-E-W request for information concerning employees' names and so forth. There was a request for providing the names so that H-E-W could conduct a study, and the decision was made for some reason or another not then to provide the names. But a year or two later, the names and information were all provided, and H-E-W did not undertake the test simply because of the fact, apparently, that they didn't have the funds to do the study at that time. So while there were studies proposed, we'll talk about the studies that were proposed and the difficulties in getting those accomplished.

Now, I've taken too much of your time, but I want to spend just a few moments with respect to relating it to this specific case. As we've indicated, Mrs. Johnson has pleural plaques. It's been diagnosed by x-ray. We've indicated that those are the calling cards of asbestos exposure, and so she got that asbestos exposure at some point in her life. Presumably between 20 and 30 years ago. But typically, pleural plaques are asymptomatic, they don't cause any symptoms.

She claims, Mrs. Johnson claims some shortness of breath, and that's been reported to her physician, and it's been reported by her to have existed over a number of years. Her testimony at the time we took her deposition was that it didn't interfere with her work, and she'll tell you about all of that.

I should mention that during the part of the lawsuit where we're preparing to get ready for the trial, we take depositions, which are documents that are sworn statements under oath, and so we have an idea what the other side's going to say and what the testimony is going to be. And we have to rely upon what's said in those depositions in preparing for our cases.

So at the time the deposition was taken, Mrs. Johnson indicated that it didn't interfere with her work. She'd had no medical expenses except for the two, I think, doctor visits or maybe three doctor visits that she had had to Dr. Whitehouse. There will be testimony that there was no progression in her disease and that there was no disability related to her disease.

Now, undoubtedly, her husband, Don Johnson, will testify here at trial. And there will be testimony concerning the fact that he has a serious breathing problem, a lung problem. Mr. Johnson has had his own claim and that's all been entirely resolved. So the only claim that's being forwarded here by the Plaintiff is the Plaintiff's own claim, Mrs. Johnson's own claim that has nothing whatsoever to do with any claim by her husband. We're only concerned about her physical condition as it relates to this particular case.

There was slight mention of Dr. Sargent. And you'll see a videotape deposition of Dr. Sargent, and it is in fact true that his fee was fairly substantial. But when you look at his curriculum vita, his resume that's attached as an exhibit in this case, you will see that he is one of the world's foremost experts on radiology, x-rays, and asbestos-related diseases. He has written extensively in the field, and the reason that he can't be here at trial, you'll find out from his deposition, is that he's presenting a paper on asbestos-related problems at a conference in Sweden, so his testimony is going to be with respect to the x-rays that he looked at and his testimony is going to be -- or is that Mrs. Johnson's problems as far as you can see from the radiology, from the x-ray, is all on the chest wall parietal pleura, pleural plaques side; and that she has no problems inside the lung. Nothing inside the lung creating a problem with her breathing.

There will be testimony as well indicating that there are other reasons for shortness of breath. There are a lot of other things that can happen when people get short of breath, and some of us even notice it as a natural process of aging, we breathe a little deeper as we go up the stairs when we are going home.

In conclusion, I've -- I don't know whether you've ever seen it, they've had these brief histories of time things where they've taken photographs and run through a long period of time with photographs in just a few minutes; and that's what I sort of feel like I've done here. We've gone through 40 years' progress with respect to the Zonolite plant and W. R. Grace plant in Libby. We'll round that out for sure during the testimony here today.

Much has happened, and much of what has happened, I haven't had the opportunity or the time to mention to you this morning. But it's our contention and our belief that when you view all of the evidence, you will find that there has been continual improvement from the early '50s in the operating conditions at the mine and mill as far as attempting to control the dust problem. There will have been some fluctuations with regard to dust level, but the improvement has been continuing. There will be evidence of careful monitoring of the employees from at least 1964 on, and that's when W. R. Grace took over the mine and mill. And it's our belief that there will not be evidence of any callous disregard of either the employees or any third parties like Mrs. Johnson in this particular case. The evidence simply will be and Mr. Lovick will tell you that they had no idea that there would be exposure problems that could be created to people who weren't employees at the mine and mill and who didn't come up to the mine and mill for any purposes.

During the process of this trial, we will trust that you will do several things. We will trust that you will judge the case on facts and not on sympathy. We trust that you will await until the entire case is submitted to you before you make up your mind what's right and what's wrong in this case. We trust that you will treat W. R. Grace the same as you would treat an individual that walked into the courtroom. We trust that you will apply the law that the Judge gives you. We trust that you will remember the context of this action. And by "context" I mean, the time periods in which the events occurred that are significant in the case and the knowledge that was available at that time. And then finally, we trust that you will treat only the case that is presented to you here today and over the next few days and won't think about other people's cases, particularly Mr. Johnson's which has already been resolved.

I certainly appreciate your attention, ladies and gentlemen of the jury, and thank you for serving here today.

THE COURT: Thank you, Mr. Graham. I think this would be an appropriate time for us to take a noon recess. I'll excuse you until one o'clock, and you'll start hearing testimony at that time. But please remember that you are not to discuss this case among yourselves or with anyone else until it's finally submitted to you. And that will happen, as I pointed out earlier, after you've heard all the evidence, the Court's instructions on the law, and the argument of counsel, and that will take place probably sometime early next week.

So with that, I'll excuse you and we'll resume at one o'clock.

(The proceedings in this matter were recessed at 11:52 a.m. and reconvened at 1:13 p.m.)

(The following proceedings were had in open court, with the jury present, beginning at 1:13 p.m.:)

THE COURT: All the jurors are present and all counsel are present. Before I ask the attorneys for the Plaintiff to call their first witness, I just want to tell you two things, members of the jury: Remember that Mildred Johnson is the only Plaintiff in this case. In considering the issues in her case, you are not to consider or be influenced by the disposition of her husband's case. Do you understand that? Do you understand what I'm saying? Okay.

And then the other statement I wish to make is this: That the W. R. Grace and Company is the successor to Zonolite Company. And unless you're otherwise instructed, the conduct and activities of Zonolite are to be considered as the conduct and activities of the W. R. Grace and Company. Do you understand that? Is that clear to you?

THE COURT: All right. Fine. Thank you. You may call your first witness.

MR. LEWIS: Thank you, Your Honor. The Plaintiff would call Mr. Earl Lovick to the witness stand.

EARL D. LOVICK, having been called as a witness on behalf of the Plaintiff, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Would you please state your name and spell your last name.

THE WITNESS: My name is Earl D. Lovick. L-O-V-I-C-K.

CLERK OF COURT: Thank you. You may be seated.

DIRECT EXAMINATION

BY MR. LEWIS:

Q Mr. Lovick, where do you currently reside?

A 1021 Idaho Avenue, Libby, Montana.

Q Who is your employer?

A I'm unemployed. I am retired.

Q Well now, Mr. Lovick, that's not quite true, is it? Isn't it a fact that you're employed to attend this trial for W. R. Grace?

A Yes, sir.

Q And they're paying you to appear in this trial; is that true?

A Yes, sir.

Q And you do consulting work for W. R. Grace from time to time, and you've done so ever since you've retired; is that true?

A Yes, sir.

Q When did you technically retire or retire as a full-time employee from W. R. Grace?

A June 30th, 1983.

Q When you retired from W. R. Grace on June 30, 1983,

how long had you been in the service of W. R. Grace or its predecessor in interest, Zonolite Corporation?
A Just over 35 years.
Q Since your retirement, have you been asked by W. R. Grace to -- or paid by W. R. Grace to compile certain information concerning asbestos-related lung disease arising out of the Libby operations?
A Yes, sir.
Q And have you been paid to give depositions by W. R. Grace in a number of cases similar to this?
A Yes, sir.
Q And is it true that this is the first case of this kind to ever be submitted to a jury or to be tried to a jury?
A I don't know.
Q Well, Mr. Graham said in his opening statement that you were the corporate representative. And the reason you were the corporate representative was because you knew more than anyone else about what went on at the mine and the mill. Do you recall that statement he made?
A Yes, sir.
Q Do you know of any other case that's ever been submitted to a jury in Montana?
A No, sir.
Q What's your educational background, sir?

A I have a Bachelor of Art's Degree in business administration from the University of Montana.
Q When did you obtain that degree?
A In 1947.
Q After you graduated from the University of Montana, what was your first job?
A After I graduated from the University of Montana, I took two quarters of graduate work, and then I was hired by Zonolite Company.
Q What was the nature of your graduate work?
A It was in the -- It was in business administration with a major in accounting.
Q You were hired by Zonolite in the accounting department; is that correct?
A Yes, sir.
Q What was your initial job title?
A Accountant.
Q How long did you hold that particular position?
A Well, I held the position of accountant until 19- -- 1961, I believe it was.
Q So from 1948 to 1961, you worked as an accountant; is that true?
A Yes, sir.
Q And then what position did you take?
A Well, my title at that time in 1961 was assistant to

the manager, and the up until that time, I had the responsibility for the accounting plus -- plus some other responsibilities. And in 1961 an accountant was hired to do the major part of the accounting work.

Q From 1948 to 1961, as an accountant, where was your office located?

A In the town of Libby, City of Libby.

Q Is the headquarters for Zonolite or W. R. Grace's operations located in the town of Libby as opposed to on the mountain?

A For the Libby operations, it was in the City of Libby, yes.

Q So for the entire period of your employment by Zonolite or W. R. Grace, the headquarters was in the town of Libby; is that correct?

A Yes, sir.

Q And that was about 12 miles away from the mill; is that correct?

A By road, yes.

Q And how far -- How far as the crow flies?

A From -- Between seven and nine miles.

Q You know, when I go to Libby, sometimes I stay at a place called the Venture Motel. Have you ever been there?

A Yes, sir.

Q You can stand at the Venture Motel and see that white

gash, you know, on the side of that mountain. Is that the mine?
A Yes, sir, it is.
Q Do you recall when W. R. Grace acquired Zonolite Company?
A Yes, sir.
Q What was the date of that acquisition?
A April 20th, 1963.
Q And at that time, were you still assistant manager?
A Yes, sir.
Q Who was your immediate supervisor when you became assistant manager?
A Raymond A. Blake.
Q And was he -- Did he maintain the position of manager of the mill when W. R. Grace acquired the company?
A Yes, sir.
Q For how long?
A Until 1968.
Q What happened that caused him to leave the company or to cease being manager in 1968?
A He died.
Q What did he die of?
A Lung cancer.
Q When Mr. Blake died of lung cancer in 1968, did you become manager of the plant?

A Yes, sir.
Q And was your office still at that time in the town of Libby?
A Yes, sir.
Q And was your office as assistant manager in the town of Libby?
A Yes, sir.
Q And your primary function up until that time had been in the area of accounting and business; is that true?
A Yes, sir.
Q And that was what your formal education involved, accounting, crunching numbers, that sort of thing; is that correct?
A Yes, sir.
Q And so up until 1968, it would be fair to say that you spent very little time on the mountain; is that correct?
A I don't know what "very little time" means, sir.
Q Well, you spent the vast majority of your time in the office; is that correct?
A Yes.
Q And in fact, I've seen some exhibits here, and to speed things up, I'll try to deal with it in a general way. There are exhibits here where you folks at the mine tried to differentiate between the various jobs as to who had the most dust exposure; right?

A Yes, sir.
Q Would you agree with me that the place that had the least dust exposure in the whole company was the office where you worked in the town of Libby?
A Might I ask when you say "the whole company," are you speaking of the Libby operation?
Q That's good point. I apologize. Let me change the question. Good point. As to the operations in Libby, the place in the company that had the least dust exposure, would that be the office where you worked in the town of Libby?
A Yes, sir.
Q And when you became manager of the company in 1968, how long did you hold that position?
A Until 1971.
Q What happened in 1971 that resulted in your changing your position.
A In 1971, there was a man brought in from another branch of the Grace organization to head up the Libby operation while they were building a new mill and getting that on stream.
Q Is the mine or the mountain where the mine is located sometimes referred to as Vermiculite Mountain?
A Yes, sir.
Q In 1971, you had already been diagnosed as having

asbestosis yourself; is that true?

A No, sir, that's not true.

Q Did you in fact have surgery for asbestos-related pleural disease in the early 1970s?

A Yes, sir.

Q When?

A To the best of my recollection, it was 1972 or 1973.

Q And it's true, is it not, that virtually all your time with the company up until that time that your lung disease was diagnosed was spent at the office in downtown Libby; is that true?

A Well, I must -- I must say that, again, I don't know what you mean by all of my time. I'd like to explain a little bit. For six months, approximately, in 19 -- in 1946, I worked at the mine primarily as a truck driver. And after I came to work in 1948, on a full-time basis with the title of accountant and later as assistant manager, I made frequent trips to the mining and milling operation and spent time at that operation.

Q But I think you just testified that the vast majority of your time was spent in the office at the safest place in the company, downtown Libby; is that true?

A Yes, sir.

Q And did you have surgery to remove pleural thickening or some such thing from your lungs in the early '70s?